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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE JACOBO, Defendant and Appellant.	B198794 (Los Angeles County Super. Ct. No. KA044508)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Genesta, Judge. The judgment is affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jose Jacobo (appellant) of one count of second degree murder. (Pen. Code, § 187, subd. (a).) The trial court sentenced appellant to 15 years to life in state prison.

Appellant appeals on the ground that the trial court's refusal to instruct on the lesser included offense of voluntary manslaughter violated his right to due process.

FACTS

Prosecution Evidence

On April 27, 1999, sheriff's deputies found the body of Julio Roberto Perez (Julio) in the mountains pursuant to information appellant had given them.[1] After an investigation, appellant was charged and tried for Julio's murder in an information filed July 28, 1999.

At appellant's instant trial, the prosecutor read into the record appellant's testimony from his first trial in August 2000, in which he was convicted of first degree murder.[2] Appellant testified that he was 32 years old and lived in the City of Duarte with his wife and child. He worked as a mechanic for an auto body shop. On April 26, 1999, he left work at approximately 10:30 p.m. and went to the Playroom Bar, which was next door to the shop where he worked. He played pool there for approximately an hour and consumed one beer. He left the bar to drive to a lunch truck that he frequented.

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[1] Throughout the facts portion of the opinion, we refer to the persons involved and the witnesses by their first names, or the names they commonly used, since all the trial testimony referred to them in this manner.

[2] The instant appeal is from appellant's third trial. He was convicted of first-degree murder in his first trial, and this court upheld the conviction in an unpublished opinion (case No. B144978), filed November 19, 2001. Appellant filed a petition for writ of habeas corpus in superior court in January 2004 on the ground that a juror failed to reveal his bias against Mexicans. After an evidentiary hearing the petition was granted on November 23, 2005. On January 17, 2007, appellant's second trial ended in a mistrial when the jurors were unable to reach a unanimous verdict.

Appellant drove a 1975 Chevy Nova that was in bad condition. When appellant stopped at a traffic signal, an acquaintance named Alonzo (later identified as Jose Alonzo Ramirez) called out to him. Alonzo was standing next to a fat man. Alonzo told appellant to stop and asked him where he was going. Alonzo was in front of the Leon del Mar bar, and appellant could see a Ford Granada parked in front of the bar. Appellant told Alonzo he was going to the lunch truck.

While appellant was eating near the truck, a woman named Martha Sanchez (Martha) arrived by taxi. She asked appellant to give a ride to her, Alonzo, and a friend because they were too drunk to drive. Appellant eventually agreed, and he drove Martha to the Leon del Mar.

In the parking lot of the Leon del Mar, Jose Alonzo Ramirez (Alonzo), Julio, and Jose Ramirez (Alfredo) were in the backseat of a Ford Granada. Appellant had never seen Julio before. Appellant never entered the bar. They all left in the Granada with Martha in the front passenger seat, appellant driving, and the other three men in the backseat. Appellant was told they were going to a bar, and that he should drive eastbound towards San Bernardino. He ended up in Azusa and proceeded to drive into the mountains where, he was told, they were all going to "party." Appellant drove until the car came to a gate on a mountain road.

The men in the backseat got out and walked past the gate. Appellant and Martha sat and talked, and appellant smoked. Appellant and Martha also walked but they were separated from the other three by a considerable distance. They walked a long way. Appellant saw Alfredo and Julio begin arguing about some "twenties," referring to stolen narcotics in $20 bindles. Alonzo also argued with Julio.

At some point, Alonzo and Julio started shoving each other, and a fist fight ensued. Alonzo and Alfredo got on top of Julio. Alfredo hit Julio in the head with an object several times. Alonzo held Julio. When appellant asked why they were hitting Julio, the other men said bad words to him. When Alfredo tried to attack appellant, appellant went away. He later said he moved the victim when he was on the ground with the tip of his foot while Alonzo and Alfredo were away talking.

Appellant walked back to the car. He did not see Julio being thrown over the hill into a ravine. However, he heard rocks sliding as he walked, and he believed that was what had happened. Appellant later saw Alonzo remove his shirt, which was bloody, and burn it. Alonzo and Alfredo told appellant to forget about what had happened or he could end up the same way. Alonzo drove them back to the Leon del Mar so that appellant could pick up his own car.

Appellant arrived home at almost 5:00 a.m. and did not tell his wife what had happened. The next day he called a radio personality to talk about the crime, and he was told that he should report it to the anonymous tip line. Appellant then called "We Tip." He gave his name and telephone number, although he did not have to. The "We Tip" operator gave appellant a telephone number for the sheriff's department. Appellant called and spoke with the sheriffs, and they subsequently sent a car to his house. Some deputies took him to the crime scene. Appellant lied to the sheriffs and said he had been in the mountains with a girl and had witnessed the crime.

Detective Jeffrey Leslie of the Los Angeles County Sheriff's Department went to the crime scene on April 27, 1999. He saw the victim's body about 400 feet down the side of the mountain. There were drag marks on the berm at the top of the ravine and blood splatters on rocks all the way down the side of the hill. The victim's pants were zipped and buttoned but were down around his legs. The victim's shirt and boots had been tossed down the ravine. Detective Leslie collected the victim's clothing and boots, two cigarette butts, and a Corona beer bottle.

Detective Leslie interviewed appellant, and appellant told him he had driven to the end of Highway 39 for a romantic tryst with a female named Martha. After spending approximately two and a half hours in the car, they went for a walk. They saw three men get out of a white SUV and pass them on the trail. Appellant turned to look at the men and saw that they were fighting. He and Martha drove a short distance down the mountain road and waited until two of the three men returned to the SUV and drove away.

Detective Leslie noted several things in appellant's statement that did not ring true. Appellant said he had been dating Martha for several months, but he claimed he did not know her last name and had no way to contact her. Also, it was very late at night and very cold in the mountains at the time appellant claimed they had engaged in sex in the car for two and a half hours and then gone for a walk. Detective Leslie obtained the "We Tip" form and noticed there were discrepancies in appellant's accounts. Appellant did not tell the hotline about Martha, did not describe the vehicle he saw, and he talked about one of the individuals he saw possibly being called "Chato," which he did not mention to Detective Leslie. In addition, the description appellant gave Detective Leslie of the car he saw was vague. Appellant did not initially mention an SUV, but he later said the vehicle was a 4Runner. Every time Detective Leslie showed appellant pictures of 4Runners, appellant would say that the picture did not look like the vehicle he saw.

When asked about the inconsistencies, appellant told Detective Leslie that he did not want to get Martha involved because they were both married. He said he vaguely recalled one of the men he saw calling the other "Chapo." In a subsequent interview, on May 6, 1999, appellant named Alonzo and Alfredo as the attackers. He began to make statements that were in line with his testimony from his first trial. Appellant identified Alfredo in a photographic lineup. At one point appellant said he himself had held the victim by the legs or ankles.

An autopsy revealed that Julio died of multiple traumatic injuries, and many of them had occurred when he was still alive. There were ligature marks on his neck and signs of asphyxia. There were multiple sites of blunt force trauma on the head, face, chest, back, and arms. He had abrasions and bruises on his fingers and knuckles. The latter injuries could have been caused by being in a fight or by being thrown down the ravine and hitting rocks on the way. Abrasions on the upper back indicated that Julio had been dragged. Toxicology reports showed that Julio had consumed alcohol and cocaine shortly before death.

Manuel Munoz (Munoz), a criminalist with the Los Angeles County Sheriff's Department, examined appellant's Chevy Nova and Alfredo's Ford Granada. Appellant's

car was dirty and full of trash. Munoz collected blood stains from the rear seat cover and from underneath the rear seat. Munoz collected small blood stains from the driver's door of the Granada. Munoz tested the Granada's steering wheel and turn-signal indicator for blood, and the swab revealed the presence of blood invisible to the naked eye.

Steve Renteria (Renteria), a criminalist for the Los Angeles County Sheriff's Department examined all the biological evidence in the case for DNA profiles. He was unable to detect any human DNA on one of the swabs taken from the interior of the Granada. The other swab from the interior of the Granada was not tested. Renteria was unable to detect human DNA on the blood sample from the outside of the Granada. The blood found on the rear seat cover and under the rear seat of appellant's car matched the victim's DNA type. One of the cigarettes collected from the crime scene on the mountain contained a DNA profile that matched appellant's DNA.

Martha said she worked as a waitress at the Leon del Mar on April 26, 1999. She was paid $3 for every $8 beer a patron purchased. On April 26, 1999, she played pool with Alonzo and Alfredo in the bar. She was dating Alonzo. Julio was there, and he bought everyone a round of beer. At approximately 1:00 a.m., appellant came to the bar and bought Martha several drinks.

Julio came over and asked Martha to dance. When Martha turned him down, Julio walked away and sat down. He later asked her again, and both appellant and Martha told him "No" and to leave Martha alone. Martha thought Julio was drunk. Julio kept telling appellant that he knew him and knew that appellant had cocaine. Appellant denied this. There was an argument back and forth about whether Julio knew appellant. Julio said he was a Guatemalan guerilla, and "two or three" were going to go down that night. Appellant moved his jacket and showed Julio a gun appellant carried in his waistband. Martha believed it was mere drunken talk.

At 2:00 a.m., the bar closed. Martha walked out the back door with appellant, Julio, Alfredo, and Alonzo. Martha declined appellant's offer of a ride home and decided to take a taxi home because appellant was carrying a gun. Martha told the taxi to circle the block around the bar to see if Alonzo was still in the parking lot. When the taxi

passed the bar parking lot a second time, Martha saw appellant talking with Julio. Alonzo and Alfredo and Alfredo's car were gone. There was a black truck in the parking lot.

Martha met Alonzo and Alfredo again that night at her apartment where they were going to do some cocaine. She had already ingested some cocaine that appellant had given her in the bar. Martha shared a room with Delfina Cardenas (Delfina), who sometimes dated Alfredo. Delfina arrived at the room at some point that night. Everyone stayed up all night and got high. Martha's and Delfina's children were in the room. Martha said she never dated appellant, she did not meet him at the lunch truck, and she did not go to the Azusa Canyon mountains with him or ride in his car.

Alfredo testified that he went to the Leon del Mar almost every night in April 1999 and met Alonzo there. Alonzo was Martha's boyfriend. Alfredo had seen Julio in the bar a few times. On April 26, 1999, appellant was in the bar, as was Julio. Julio was making a lot of noise and buying beers for everyone. Julio said loudly, "It's going to get fucked up," and "Two or three heads are going to fall." It seemed he had been drinking. Alfredo did not believe Julio was talking to anyone in particular. When the bar closed, Alfredo left with Alonzo and went to Alfredo's car. Alonzo got in the passenger seat. Julio went up to Alfredo and asked if he could score a "20," but Alfredo said "no." Alfredo saw only appellant and Julio in the parking lot when he left. They were not arguing.

Alfredo and Alonzo went to the home of La Tia, a lady who sold cocaine. She was not home, and they did not buy cocaine. Alfredo then drove to Martha's. They did not do any cocaine that night because he had not scored any. He was dating Martha's roommate, Delfina, who was not there that evening. Alfredo said he did not go up the mountain with Alonzo, Martha, Julio, and appellant.

Defense Evidence

Delfina testified that she and her children shared a room with Martha and Martha's children, and that she dated Alfredo. Alonzo and Alfredo often gave the two women rides, and sometimes they did drugs together. They only did drugs when the children

were at a babysitter's. Delfina worked as a waitress at the Leon del Mar also, but she said she was not sure if she worked on April 26, 1999. She did not know about the waitresses being paid to drink with customers.

Later in her testimony, Delfina said she remembered Martha, Alonzo, and Alfredo being there the night the person died. She said she left the bar with Martha, Alonzo and Alfredo on that night. She saw two men talking in the parking lot. She drove around with the other three and eventually got some food. They went back to the parking lot about two hours later and saw only the truck in the parking lot.

Bulmaro Ruiz (Ruiz) owned the B & C Auto Body shop, which was next door to the Playroom Bar and one block from the Leon del Mar. Appellant had worked for him for three or four months prior to his arrest. Appellant usually worked from 8:30 a.m. to 5:30 p.m. Occasionally, Ruiz's employees stayed at the shop drinking and talking. Police officers searched appellant's Nova once or twice while the car was at the body shop. Ruiz recalled that appellant had given him a ride to the hospital once when Ruiz had cut himself. Ruiz had bled in appellant's car.

DISCUSSION

I. Appellant's Argument

Pointing out that the trial court gave several voluntary manslaughter instructions to the jury in his second trial, which ended in a deadlocked jury, appellant argues that the trial court erred by denying his request for voluntary manslaughter instruction based on heat of passion in the third trial. In a motion for new trial, appellant contended that the trial court's error denied him his rights to due process, equal protection, and a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and its California counterparts. On appeal, appellant reiterates that, if the evidence pointed to murder, it equally pointed to voluntary manslaughter, and there was substantial evidence the killing could have been the result of heat of passion.

Appellant points out that the evidence was entirely circumstantial, appellant denied committing the crime, and no one implicated him. Appellant maintains that it is reasonably probable he would not have been convicted of second degree murder had the

instruction been given, and the constitutional error was not harmless beyond a reasonable doubt.

II. Proceedings Below

The discussion among the trial court and the parties regarding the reading of voluntary manslaughter instructions is not part of the record. During the hearing on the new trial motion, defense counsel and the trial court stated for the record that counsel had requested the voluntary manslaughter instruction based on heat of passion and the trial court had denied it. In denying the new trial motion on the ground that the instruction should have been given, the trial court stated, "The court's position in regards to the manslaughter instruction is that there's no evidence in the record the court could rely upon or saw or heard in which the court could infer heat of passion in this matter."

III. Relevant Authority

Second degree murder is an unpremeditated killing committed with malice aforethought. (Pen. Code, §§ 187, subd. (a), 189; *People v. Seaton* (2001) 26 Cal.4th 598, 672.) Voluntary manslaughter is an intentional and unlawful killing committed without malice aforethought. (*People v. Rios* (2000) 23 Cal.4th 450, 460–461 (*Rios*).) The crimes of second degree murder and voluntary manslaughter are lesser included offenses of first degree murder. (*People v. Blair* (2005) 36 Cal.4th 686, 745 [second degree murder]; *Rios*, *supra*, 23 Cal.4th at p. 461 [voluntary manslaughter].) A killing may be reduced from murder to voluntary manslaughter if it occurs upon a sudden quarrel or in the heat of passion on sufficient provocation, or if the defendant kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).)

To reduce the crime to voluntary manslaughter based on heat of passion, the provocation that incites the killer to act must be caused by the victim or reasonably believed by the accused to have been engaged in by the victim. The provocative conduct may be physical or verbal. However, it must be such as to have caused the defendant to be aroused and also would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Manriquez*, *supra*, 37 Cal.4th at pp. 583–584;

People v. Breverman (1998) 19 Cal.4th 142, 163; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1311.)

It is well-established that a trial court must instruct the jury not only on the crime charged but also on lesser offenses that are both included within the crime charged and supported by the evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 190, 194–195.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) The burden is on the defendant to establish sufficient evidence of provocation and heat of passion. (*Rios*, *supra*, 23 Cal.4th at pp. 460–462; *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.) Provocation evidence offered to reduce the degree of murder must "'justify a jury determination that the accused had formed the intent to kill as a *direct* response to the provocation and had acted *immediately* . . . .' [Citation.]" (*People v. Fenenbock*, *supra*, at p. 1705.)

In deciding whether there is substantial evidence of a lesser included offense, we do not evaluate the credibility of the witnesses, a task for the jury. (*Manriquez*, *supra*, 37 Cal.4th at p. 585.) We employ a de novo standard of review when determining whether a lesser included offense instruction should have been given. (*Id*. at p. 584; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

IV. Instruction Properly Denied

We agree with the trial court that there was insufficient evidence that the killing of Julio occurred upon a sudden quarrel or heat of passion. In *Rios*, our Supreme Court explained that a defendant is entitled to voluntary manslaughter instructions only where evidence of provocation has been introduced, either in the prosecution's case or by the defendant. Only if there has been evidence of provocation introduced does the prosecution have the burden of proving the absence of provocation beyond a reasonable

doubt. (*Rios, supra,* 23 Cal.4th at pp. 460–462.) In addition to demonstrating objectively that provocation existed, there must also be evidence that demonstrates subjectively that the defendant's reason was in fact obscured by passion at the time of the act. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Neither of these components of voluntary manslaughter committed in the heat of passion was demonstrated in this case.

As the record shows, no one saw appellant arguing with the victim. Three witnesses, including a defense witness, said that appellant and the victim were merely talking in the parking lot after the Leon del Mar closed. When the victim pestered appellant for cocaine in the bar, he quickly desisted when appellant showed him his gun. Appellant's defense theory was that he was a witness rather than a participant, and he did not present any affirmative evidence that he acted in the heat of passion. It is true that, despite the inconsistency of his defense with the theory of heat of passion, appellant would have been entitled to an instruction on voluntary manslaughter if the People's case raised evidence that could support such an instruction. (*People v. Barton*, *supra,* 12 Cal.4th at p. 198.) However, the evidence presented by the People revealed no provocation that would be legally sufficient to negate malice.

Moreover, the second-degree murder verdict was justified in the instant case. According to the evidence and the reasonable inferences drawn therefrom, appellant acted as either the direct perpetrator or as an aider and abettor in what was clearly a murder. The victim's injuries show that he was severely beaten. Therefore, the jury could reasonably infer that the perpetrator or perpetrators intentionally injured the victim to the extent that they had to be aware serious bodily harm had occurred. At some point, the injured victim was strangled and dragged to the edge of the ravine, where he was thrown over and left for dead. These facts lead to the reasonable inference that great bodily injury and death to Julio were intended. DNA evidence on the cigarette found at the scene placed appellant there. There was evidence that the victim rode in appellant's car and that he bled there during the drive to the mountain.

In addition, the types of injuries suffered by Julio do not indicate that he was attacked in the heat of passion. The autopsy revealed ligature marks of strangulation as

well as multiple occurrences of blunt force trauma to Julio's face, head, and torso. These injuries do not suggest the immediacy characteristic of a killing committed in the heat of passion. (See *People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1705.)

Contrary to appellant's assertion, the jury notes do not indicate that the jury was undecided between second degree murder and voluntary manslaughter in the second trial, where the voluntary manslaughter instruction was read. Rather, the record shows that the jury believed a murder had occurred, but the jury could not reach unanimous agreement as to whether appellant had participated in the murder.

Appellant also cites the bar incident as evidence warranting an instruction on voluntary manslaughter. He argues that Julio's intoxicated behavior hinted that the killing might well have been caused by a drunken and drug-fueled argument later on. This is mere speculation. There was no evidence of an argument later on—appellant and Julio were observed talking, not arguing, in the bar parking lot. Pure speculation does not constitute the requisite substantial evidence sufficient to support a lesser included offense instruction. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 735; *People v. Wilson* (1992) 3 Cal.4th 926, 942; *People v. Lewis* (1990) 50 Cal.3d 262, 277.) If there is no proof that the offense was less than that charged, an instruction on a lesser included offense need not be given. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323–324, disapproved on another point in *People v. Barton*, *supra*, 12 Cal.4th at p. 201.) Appellant's argument is without merit, and the trial court properly rejected appellant's request for instruction on voluntary manslaughter.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ